

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

August 12, 2010

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Kauai

Authorize the Chairperson of the Department of Land and Natural Resources to Negotiate the Terms and Conditions, and Sign a Memorandum of Agreement between the Department and the County of Kauai ("County") for the Remediation / Removal of Upper Kapahi (Dam) Reservoir (HI ID #K-0013) and Lower Kapahi Dam (HI ID #K-0060), Kapahi, Kauai County, located at TMK Nos. (4) 4-6-007:011, 4-6-006:007, 4-6-008:999, and 4-6-032:022.

Applicant:

The Department of Land and Natural Resources ("Department"), Land Division

Legal Reference: Section 171-6, Chapter 179D, Hawaii Revised Statutes, as amended

Location:

Upper Kapahi (Dam) Reservoir and Lower Kapahi Dam are jointly owned by the State and County, collectively, the "Structures". The County's Kainahola Road and Kahuna Road are situated on top of the crest of the dam embankments of the Upper Kapahi (Dam) Reservoir and Lower Kapahi Dam respectively. The location of these Structures are identified as:

1. TMK No.: (4) 4-6-007:011 (Upper Kapahi) and
2. TMK Nos.: (4) 4-6-006:007, 4-6-008:999 and 4-6-032:022 (Lower Kapahi)

Background:

On November 3, 2009 and January 13, 2010, the Chairperson of the Board of Land and Natural Resources and her staff met with the Honorable Mayor Bernard P. Carvalho, Jr. and his staff to discuss the future of Kainahola Road at Upper Kapahi (Dam) Reservoir and Kahuna Road at Lower Kapahi Dam. Both of these Structures are in poor condition and in need of remediation or removal to protect the public's health and safety.

The original scope of the Upper Kapahi (Dam) Reservoir project was to stabilize and remediate the upstream and downstream embankment slopes, enlarge the spillway, and other appurtenant improvements. To accommodate the use of Kainahola Road, multiple spillway culverts must be installed and the roadway will be rebuilt to maintain its present configuration.

The original scope of the Lower Kapahi Dam project was to excavate an open channel in the embankment and breach the dam, because it is not actively used, nor are there any future plans for the Lower Kapahi Dam to retain water. To accommodate the use of Kahuna Road, a culvert sized for the 100-year storm event in accordance with dam safety standards will be installed. Therefore, maintaining access along the embankments of these Structures requires additional remediation work, significantly increasing the costs of these projects.

The Department and the County of Kauai, collectively, the "Parties", have been working together to determine a fair cost sharing agreement that would bring the Structures into compliance and meeting the County's desire for continued service along their roads. As such, the State has agreed to fully fund the design for both projects and the entire construction costs of the Kainahola Road/Upper Kapahi Reservoir remediation project, approximately, \$4,963,200.00, and the County fund the entire construction costs for the Kahuna Road/Lower Kapahi Dam removal project. The Kauai County Mayor's budget for the Fiscal Year 2011 has allocated \$1,800,00.00 for these projects.

Attached is a "draft" copy of the Memorandum of Agreement, which delineates the responsibilities of both Parties for the construction of the Structures.

Recommendation that the Board:

Authorize the Chairperson to negotiate terms and conditions, and sign on behalf of the Department and the Board of Land and Natural Resources (Board) a Memorandum of Agreement between the Board and the County of Kauai subject to review and approval as to form by the Department of the Attorney General.

Respectfully Submitted,



Lydia M. Morikawa  
Special Projects and Development Specialist

APPROVED FOR SUBMITTAL:

  
Laura H. Thielen, Chairperson

Attachment

**MEMORANDUM OF AGREEMENT**  
**REMEDIATION / REMOVAL OF THE UPPER AND LOWER KAPAHI**  
**DAMS & RESERVOIRS**

**TMK Nos. (4) 4-6-007:011, 4-6-006:007, 4-6-008:999, and 4-6-032:022**  
**("Agreement")**

This Agreement is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2010, by and between the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, by its Board of Land and Natural Resources ("State") and the COUNTY OF KAUAI ("County"), collectively, the "Parties".

This Agreement is designed to promote increased understanding, cooperation, and interaction, and to provide basic principles and guidelines for the parties to participate in the planning, design, and construction of the remediation / removal of the Upper and Lower Kapahi Dams and Reservoirs.

**RECITAL**

A. Upper Kapahi (Dam) Reservoir and Lower Kapahi Dam are jointly owned by the State and County, collectively, the "Structures". The County's Kainahola Road and Kahuna Road are situated on top of the crest of the dam embankments of the Upper Kapahi (Dam) Reservoir and Lower Kapahi Dam respectively. The location of these Structures are identified as:

1. TMK No. (4) 4-6-007:011 (Upper Kapahi) and
2. TMK Nos. (4) 4-6-006:007, 4-6-008:999, and 4-6-032:022 (Lower Kapahi)

B. The Parties met to discuss the future of Kainahola and Kahuna Roads and the State's desire to bring both Structures into compliance with the Hawaii Dam and Reservoir Safety Act of 2007 (Chapter 179D, HRS). Both of these Structures are in poor condition and in need of remediation or removal to protect the public's health and safety. Open channel cuts through both of these dam structures are the most cost effective proposal for the State to bring the Structures into compliance with dam safety standards. However, open channels through the Structures would not meet the County's desire to maintain service along their roads. Maintaining access along the embankments requires additional remediation work, significantly increasing the costs of these projects.

C. The Parties have been working together to determine a fair cost sharing agreement that would bring the Structures into compliance. As such, the State has agreed to fully fund the design for both projects and the entire construction costs of the Kainahola Road/Upper Kapahi Reservoir remediation project, approximately, \$4,963,200.00, and the County fund the entire construction costs for the Kahuna Road/Lower Kapahi Dam (the "Project") removal project. The Kauai County Mayor's budget for the Fiscal Year 2011 has allocated \$1,800,00.00 for this project.

D. The Parties desire to document their agreement of the terms and conditions upon which the County will provide contribution to this Project.

## AGREEMENT

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of what is hereby mutually acknowledged, the Parties hereby agree as follows:

1. Contribution: The County agrees to contribute to the State \$1,800,000.00 ("County Contribution") toward the construction costs of the Project, upon and subject to the terms and conditions set forth in this Agreement, including the possible adjustment of said amount as provided in Section 2 below. The County recognizes that the State's contribution to fully fund the design for both projects and fully fund the construction costs for the Kainahola Road/Upper Kapahi (Dam) Reservoir project is far greater than the County Contribution. As such, in the event the cost of this Project is less than the County Contribution, the County authorizes any remaining funds to go towards the Kainahola Road/Upper Kapahi (Dam) Reservoir project, not to exceed \$1,800,000.00.

2. Return of Funds: Any unused funds comprising all or any portion of the County Contribution shall be returned to the County, without interest, as set forth below:

a. If for any reason the State is unable to award the Project, the State shall provide written notification to the County and shall return the entire County Contribution to the County in full.

b. If for any reason the Project is awarded but there are circumstances, which arise that prevent or otherwise make impracticable its completion, the State shall return any unused portion of the County Contribution to the County.

c. If, after the State's final acceptance of the Project and the State's final payment to the Contractor there are unused funds, the State shall return any unused portion of the County Contribution to the County.

3. Permit Applications: The State or its representative shall be responsible for processing all Federal, State and County permit applications required for and comply with all laws applicable to the Project.

4. Access: To perform the work to complete both projects, the Kainahola Road / Upper Kapahi (Dam) Reservoir and the Kahuna Road / Lower Kapahi Reservoir, the State, its consultant(s), contractor(s) and any authorized representative shall have the right to access the County's properties during reasonable business hours and upon reasonable notice. Such access shall be coordinated through the County Engineer's office with approval from the County of Kaua'i Finance Director.

5. The State also agrees to require the design consultant(s) and contractor(s) to name the County as a covered party on their respective liability certificates.

6. Operations and Maintenance: The Parties agree to abide by the recommended "Operations and Maintenance Plan" that will be provided by the Consultant, subject to mutual approval and acceptance of the plan.

7. Miscellaneous Conditions:

7.1. This Agreement shall be effective upon its full execution by the Parties.

7.2. It is expressly understood and agreed that the failure of either party to insist in any one or more instances upon strict performance of any of the terms and conditions of this Agreement, or to exercise any rights herein conferred, shall not be deemed a waiver or relinquishment of any of the other party's right to assert or rely upon such terms, conditions, or rights in any other instance.

7.3. This Agreement shall be governed by the laws of the State of Hawaii.

7.4. This Agreement may be amended only by written agreement of the Parties hereto.

7.5. Binding Effect: Upon execution of this Agreement by both Parties, the Parties shall cooperate and negotiate in good faith to complete and execute any definitive documents and instruments necessary to accomplish the intended goals of this Agreement.

IN WITNESS WHEREOF, the State and the County have executed the Agreement as of the date first above written.

Approved by the Board of Land and Natural  
Resources at its meeting held on \_\_\_\_\_.

Approved as to Form:

By: \_\_\_\_\_

Date: \_\_\_\_\_

STATE:

STATE OF HAWAII, BOARD OF LAND  
AND NATURAL RESOURCES

By: \_\_\_\_\_

Name: Laura H. Thielen

Title: Chairperson

COUNTY:

COUNTY OF KAUAI

Recommended and Approved:

\_\_\_\_\_  
Donald M. Fujimoto  
County Engineer

By: \_\_\_\_\_

Name: Wallace G. Rezentes, Jr.

Title: Finance Director

Approved as to Form and Legality:

By: \_\_\_\_\_

Date: \_\_\_\_\_

DRAFT